



Questions and Answers on Fair Labor Standards Act

Q: What is the Fair Labor Standards Act?

A: The Fair Labor Standards Act (referred to as FLSA) provides minimum standards for both wages and overtime entitlements and administrative procedures by which covered work time must be compensated.

Q: What are my employee's entitlements when overtime is necessary?

A: Employees that are designated as **non-exempt** are entitled to overtime pay at 1.5 times their regular pay for all hours of work over 8 in a day or 40 hours in a workweek. When working a compressed work schedule, overtime hours means any hours over those specified in the compressed work schedule. Overtime pay for **exempt** employees is capped at 1.5 times the GS-10, step 1 pay rate.

Q: What do the terms "exempt" and "non-exempt" mean?

A: Non-exempt employees are covered by the minimum wage and overtime provisions of FLSA. Exempt employees are not covered by the minimum wage and overtime provisions of FLSA; they are covered by Title 5 United States Code Chapter 55.

Q: How are FLSA determinations be made?

A: All FLSA determinations will be based on comparing the duties in the position description to the exemptions listed in 5 CFR 551. If the duties fully support one or more of the exemptions, the position will be designated as exempt. If not, the position will be non-exempt.

Q: What conditions does GSA use to define exempt/non-exempt employees?

A: GSA applies the requirements of the Fair Labor Standards Act (FLSA) as prescribed in 5 CFR Part 551. All GSA employees are non-exempt unless the duties of their position fall into one of the seven exemptions.

Q: How do I know if my employee is exempt or non-exempt?

A: The supervisor should have a copy the position description (PD) for each employee he/she supervises. The position description contains this information in the top portion of the document under “PD Information”, in the right column. Each PD identifies whether the employee is “Exempt or “Non-exempt” next to the “FLSA” heading.

This information is also available in CHRIS. For supervisors, the FLSA Category information is located in “Manager’s View” under the “Position” tab. For employees, it is located in “Employee Views” under the “Position” tab.

Q: Why is my employee designated as non-exempt?

A: It has been determined that the duties in the job description fail to support one of the exemption criteria identified in the Fair Labor Standards Act (FLSA) in 5 CFR Subpart 551. Managers and supervisor should know that each employee is presumed to be non-exempt unless the agency correctly determines that the employee clearly meets one or more exemptions provided in subpart 551 (see 5 CFR 551.102). It further states that exemption criteria must be narrowly construed to apply to only those employees who are clearly within the terms and spirit of the exemption and that the burden of proof rests with the agency that asserts the exemption. So if it is questionable whether a set of duties fully meets an exemption, it will be designated as non-exempt.

Q: Is there is no relationship between FLSA status and Bargaining Unit (BU) Status?

A: The FLSA status, whether an employee is non-exempt or exempt, is based on the duties described in their position description and what they actually do as compared to the Fair Labor Standards Act. The employee’s Bargaining Unit Status (BUS) and the BUS Code assigned are numbers which are used in identifying the specific labor organization that the employee is included or whether the employee’s position is excluded by statute.

FLSA status determinations are handled in Classification whereas BU determinations are handled in Labor Relations. This may be confusing since many of you are aware of the changes during 2013 in FLSA statuses for some positions as a result of grievances filed by unions in GSA. So while these actions were the result of a grievance for a particular BU, the FLSA determinations were applied across the board to impacted positions regardless of BU status and the BU status remained the same for all positions impacted.

Q: What are the exemptions referred to above?

A: The exemptions to FLSA are: Executive (5 CFR 551.205), Administrative (5 CFR 551.206), Professional (5 CFR 551.207) – Learned Professionals (5 CFR 551.208) and Creative Professionals (5 CFR 551.209), Computer Employees (5 CFR 551.210), for performing different work or duties for a temporary period of time (5 CFR 551.211), and the Foreign Exemption (5 CFR 551.212).

Q: What are the primary differences between non-exempt and exempt employees?

A: These are the primary differences:

Non-exempt employees must be paid overtime at the rate of 1.5 times their regular pay rate for overtime ordered and approved. Exempt employees are receive overtime at the rate of time and one-half the GS-10, step one pay rate, or their hourly overtime rate, *whichever was greater*.

[Section 1121 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) amended the overtime pay cap provisions that apply to employees covered by 5 U.S.C. 5542(a)(2). The new overtime pay cap became effective on November 24, 2003. These hourly overtime pay limitations do not apply to prevailing rate (wage) employees or to FLSA overtime pay.]

Non-exempt employees cannot be given compensatory time for overtime worked. Exempt employees can be paid overtime or be given compensatory time.

Non-exempt employees are not subject to the maximum earnings limitation. Exempt employees cannot earn more money than the maximum level of a GS-15 in a particular pay period.

“Suffer and permit” applies to non-exempt employees; it does not apply to exempt employees.

Q: What is “suffer and permit”?

A: “Suffer and permit” applies to non-exempt employees only. Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. Managers need to ensure that non-exempt employees do not work through their designated lunch break or in excess of their assigned work shift.

Q. Do I have to compensate a non-exempt employee who accomplishes work remotely (e.g., via government-issued smart phones and other mobile devices) outside of work hours?

A. GSA is required to pay **non-exempt** employees who take calls and otherwise work after hours or on the weekends, regardless of whether it was ordered and approved by management in advance. To avoid unexpected overtime liabilities, it's important for managers to exercise control of employee use of these devices, communicating to non-exempt employees that they are not to monitor or respond to phone calls or emails outside of their work hours.

Q: Is exempt or non-exempt status tied to GS level?

A: No.

Q: Is exempt or non-exempt status tied to supervisory status? Are all supervisors considered exempt?

A: Generally, supervisors should meet the executive exemption under 5 CFR 551.205 as long as they supervise at least two full-time employees and have full supervisory authority.

Q: How does FLSA status affect overtime vs. compensatory time?

A: Non-exempt employees must be paid overtime; they cannot be given compensatory time for overtime worked. Exempt employees can be paid overtime or be given compensatory time.

Q: Does overtime/compensatory time need to be approved before it is worked?

A: Yes. All employees are prohibited from working overtime or compensatory time without prior approval from their supervisor, except in emergency situations. In emergency situations when it is not possible to obtain prior approval, the overtime or comp time worked should be reported to the supervisor for approval as soon as possible after it is worked. In emergencies when it is impossible to get advance authorization, overtime/comp time may be permitted, but only when it involves public health or safety or the requirement is so urgent as to make it clear that overtime would be approved.

Q. How is overtime and compensatory time documented?

A. Overtime and compensatory time for all employees must be requested and approved in ALOHA.

Q: What rights do supervisors have in deciding to provide compensation to their employees as either overtime or compensatory time?

A: The only flexibility supervisors have is with exempt employees. Supervisors have the right to dictate the use of overtime or compensatory time. For example, supervisors may not have money budgeted for overtime; in this case, compensatory time may be authorized by the supervisor. However, if the budget warrants and the employee has many hours of use or lose leave, overtime may be directed by the supervisor.

For non-exempt employees, overtime must be paid at the rate of 1.5 their regular pay.

Q: I have several non-exempt employees request to work compensatory (comp) time instead of overtime. Can I allow them to work comp time if they request it?

A: No. Non-exempt employees must be paid overtime at the rate of 1.5 times their regular pay for all hours of work over 8 in a day or 40 hours in a workweek.

Q: How do we ensure the correct FLSA status of an employee throughout the career lifecycle?

A: Checklists have been developed by the Policy Office for each exemption under FLSA. Beginning in May 2013, the National Classification Team will compare the duties in all new position descriptions to these checklists to ensure the correct FLSA category is assigned.

Q: Now that staff primarily works in a virtual environment wherein most employees are teleworking 3 to 4 days a week and at different locations, how do we ensure non-exempt employees only work the allowed number of hours?

A: Under these circumstances, it is more difficult. Employees should be told on a regular basis, followed up in writing, that as non-exempt employees, the supervisor cannot allow them to work in excess of their established work shift. In addition, employees should be reminded that overtime must be requested and approved in advance. With that being said, if a supervisor of the non-exempt employee is getting emails from that employee after their assigned work shift, the supervisor should promptly let the employee know that the issue can wait until the next workday--that overtime has not been approved for time in excess of their work shift.

Q: We've been operating under the rule that employees at the GS-11 and below were non-exempt. Is this still true?

A: This is still true for employees in **non-professional** positions. However, this has never been the case for employees occupying professional positions. If you have

questions as to whether a position is professional or non-professional, feel free to contact your servicing HR Office.

Q: Who handles employee appeals for FLSA determinations?

A: If the employee is a member of a bargaining unit covered by a collective bargaining agreement, the employee must use the negotiated grievance procedure to appeal the determination. If the employee is not a bargaining unit employee, the employee can file a claim with GSA, the Office of Personnel Management, or may bring an action in the appropriate United States court.

Q: Is a non-exempt employee entitled to pay if he or she is called back to his/her duty station?

A: Yes. Unscheduled overtime work performed by an employee on a day when work was not scheduled for him/her, or for which he/she is required to return to his/her place of employment, is deemed at least 2 hours in duration for the purpose of premium pay (even when they actually work less than 2 hours). However, the employee cannot be compensated for his/her normal commute time to and from the duty station.

Q. What is the difference between “irregular or occasional” overtime and “regular or recurring” overtime?

A. Regular overtime is scheduled in advance of the workweek. In order to be regularly scheduled, the number of hours of overtime to be assigned to each employee must be established as part of the regular schedule. Overtime that is performed on a relatively infrequent or less-predictable basis is “**irregular or occasional**”. Most overtime in GSA falls under this latter category due to its irregular and unpredictable nature and the fact that it is not always known which employee will perform it before the beginning of the week.

Q. Can a non-exempt employee earn/use credit hours?

A. Subject to local policy, a **non-exempt** employee *on a flexible work schedule* (e.g., maxi flex, flextime) can earn/use credit hours. The reason is that credit hours are worked at the *election of the employee*, with supervisory approval, and are distinguished from overtime hours in that overtime is *officially ordered and approved by management*. Credit hours are not permissible under a compressed work schedule (i.e., a 5/4/9 work schedule). (Reference: [OPM's Handbook on Alternative Work Schedules](#))